85-575

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROGER L. BARA, DAVID E. CAMIC, VICTOR GODINEZ, DANNY HORNBACK, CARL J. IVANYI, STAN KAHLE, SANTOS FRANCISCA GARZA KOEHNKE, FRANK MEXIN, BILL POWELL, ANTHONY C. RUSSO, JOHN P. RYAN, GERALD L. SOCS, JOSEPH L. STRATMAN, and DAVE TORRES,

Petitioners,

vs.

AURORA CIVIL SERVICE COMMISSION OF THE CITY OF AURORA, ILLINOIS and DAVID E. CHRISTENSEN, CHIEF EXAMINER OF THE AURORA CIVIL SERVICE COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733
Attorney for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

39pp

QUESTION PRESENTED FOR REVIEW

Does the liberty interest protected by the Fourteenth Amendment of the United States Constitution preclude the use of arbitrary, capricious, and unreasonable promotional schemes in public employment?

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OPINIONS BELOW

On November 16, 1983, the Honorable James B. Moran granted a motion to dismiss the petitioners' complaint as to the alleged denial of due process rights in the preparation of the promotional eligibility list (Appendix B).

Judge Moran dismissed the remainder of the petitioners' complaint on December 10, 1984 (Appendix C).

The United States Court of Appeals for the Seventh Circuit affirmed the district court in an order issued July 1, 1985 (Appendix A).

JURISDICTION

1. The petitioners raised the federal question relative to the denial of their due process rights under the Fourteenth Amendment in the district court and in the Court of Appeals.

2. The petition for a writ of certiorari was filed within 90 days after the entry of the judgment by the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, on July 1, 1985.

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Certain police officers of the City of Aurora, Illinois, brought a section 1983 action against the Aurora Civil Service Commission, seeking damages and declaratory relief for alleged violations of their constitutional rights. The alleged violations stem from the procedures used to determine ranks on a promotional list used by the police department. Prior rankings were compiled under a rule of the Civil Service Commission which provided:

> All advancements shall be determined by competitive examination and shall be open to employees qualified for promotion to a particular position. Promotions shall be made from promotional lists in the manner prescribed by state statute, such lists to be compiled on the basis of fair examination, work performance, and oral examination.

Aurora Civil Service Commission, Rules and Regulations, Ch. 6, sec. 6.01, subpar. b.

In April, 1982, the Commission substituted a "promotability factor" for the oral examination and past work performance elements. The promotability factor only purported to evaluate an individual's ability to fill a position of higher rank rather than take past performance into account.

The petitioners contended that the new way of computing eligibility for promotion was a denial of due process, in that they were deprived of a property right based on the old rule, or alternatively a liberty interest, in that the arbitrary promotability factor made the examination not job-related. The petitioners also alleged that the Commission improperly ignored their protests about the examination process.

The district court dismissed the complaint as to the property right and liberty interest issues on November 16, 1983. The court dismissed the balance of the complaint on December 10, 1984.

The petitioners then took a timely appeal. The Court of Appeals held that no property right in the examination procedures existed, and further held that an arbitrary, non job-related promotional examination could not implicate constitutionally protected liberty interests. The decision was rendered on July 1, 1985.

REASONS FOR GRANTING THE WRIT

While the government has a right to test individuals in order to judge their qualifications for a position, the petitioners submit that when this testing is done in an arbitrary manner, it is a violation of due process. Specifically, the failure of the testing process to be job-related infringes on constitutionally protected liberty interests.

Due process requirements apply when interests encompassed by the Fourteenth Amendment's protections are implicated. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). What must be considered is not the "weight" but the nature of the interest at stake. *Morrissey v. Breuer*, 408 U.S. 471, 481 (1972).

The concept of liberty of occupation is fundamental in American society. *See, e.g.*, Madison, *Essay on Property*, in 6 Madison, Writings 101 (Hunt ed. 1906 [1792]). As this Court has observed:

> The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure . . .

Truax v. Raich, 239 U.S. 33, 41 (1915).

An arbitrary deprivation by the government of an individual's right to engage in an occupation has not withstood scrutiny by this Court. *Meyer v. Nebraska*, 262 U.S. 390 (1923), *see also Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

This diligence by the Court is entirely proper and indeed necessary as:

> Employment is one of the greatest, if not the greatest, benefits that governments offer in modern day life. When something as valuable as the opportunity to work is at stake, it may not reward some citizens and not others without demonstrating that its actions are fair and equitable.

Roth, supra at 589 (Marshall J., dissenting).

Based on these important considerations, it seems unlikely that an arbitrary promotional examination procedure could satisfy due process requirements.

In *Kongisberg v. State Bar of California*, 366 U.S. 36 (1961), the Court upheld a state's refusal to license an applicant to the bar because of his refusal to answer questions. Central to the Court's decision was the requirement that the particular questions asked be substantially relevant to the applicant's qualifications, thereby satisfying due process. *Id.*

Similarly, the petitioners' interests in a fair, job-related promotional examination deserve due process protection. Indeed, the Seventh Circuit had clearly recognized these

interests and had held that a liberty interest in a job-related promotional examination did exist. *DiIulio v. Board of Fire and Police Commissioners*, 682 F.2d 666 (7th Cir. 1982). *DiIulio* would have provided a remedy for the arbitrary testing procedures that formed the basis for the petitioners' lawsuit.

However, the Court of Appeals decided to take away this remedy on the grounds that *DiIulio* was overruled by another case decided the same day as the case at bar. *Bigby, et al. and Thoele, et al. v. City of Chicago, et al.*, No. 84-2284 (7th Cir., decided July 1, 1985) (reprinted in Appendix D).

The rationale for the *Bigby* decision stems from the unsupported determination by the Court of Appeals that the liberty of occupation does not extend to the individual ranks within a broad class of occupation. The petitioners contend that this reasoning is defective and should be rejected by this Court.

The petitioners would submit that the foundation for the concept of liberty of occupation is the desire to protect an individual's opportunity to better himself. The Court has been vigilant in striking down arbitrary barriers to this striving for achievement and its rewards that is the essence of American society. The notion that the government may not arbitrarily restrict access to entry-level positions and at the same time may frustrate an individual's opportunity for advancement based on merit is utterly illogical and constitutionally impermissible.

The implications stemming from similar activity in a different context also vividly demonstrate the necessity of recognizing a liberty interest in this case. The arbitrary testing procedures implemented would never pass scrutiny if this were a Title VII case. Stated another way, if a

minority interest were present here, the Civil Service Commission would bear the difficult burden of validating *every* component of the promotional procedure, in order to demonstrate that it was fair to all concerned. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), *Abermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).

The petitioners ask nothing more than that fair procedures be used in determining promotion. However, because the Court of Appeals refused to recognize a protected interest here, the petitioners are denied access to the process needed to make that determination of fairness. It is unfair and illogical to deny that opportunity and, in effect, "punish" the petitioners because they are not members of a minority group.

The petitioners respectfully suggest that this Court act to prevent this injustice. If the situation is not addressed, individuals such as the petitioners will be left with no effective protection against arbitrary governmental action. The long-recognized interest in liberty of occupations needs to be clarified to include merit considerations of employment relative to promotions to reward the best qualified.

CONCLUSION

For reasons enumerated herein, the writ should be granted.

Respectfully submitted,

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733

Attorney for Petitioners

APPENDIX A

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted June 26, 1985*

July 1, 1985.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

ROGER L. BARA, et al.,

Plaintiffs-Appellants,

No. 85-1050 vs.

AURORA CIVIL SERVICE COMMISSION OF THE CITY OF AURORA, ILLINOIS and DAVID E. CHRISTENSEN, CHIEF EXAMINER OF THE AURORA CIVIL SERVICE COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 6703—James B. Moran, *Judge.*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

The plaintiffs, police officers in Aurora, Illinois, seek damages, declaratory, and injunctive relief against the Aurora Civil Service Commission and David Christensen, its Chief Examiner (collectively referred to as "the Commission"). The facts are essentially undisputed. Plaintiffs have been placed on the 1983 list of eligibility for promotion to either sergeant or lieutenant. The list was compiled using three weighted factors: a written examination (50%), seniority (20%), and a "promotability factor" (30%). The plaintiffs challenge the derivation of the promotability factor.

The complaint says that this factor is new, replacing oral examinations and supervisors' evaluations of the police officer's work. The new system was announced in a General Bulletin of the Commission, which stated that a promotion board comprising of the police chief and the bureau commanders would assign a promotability score to each officer seeking advancement. The focus of the promotion board's inquiry was to be the ability of a person to fill a position of higher rank, rather than that person's past performance. Every police officer in the Department is assigned to a rater (the police officer's immediate supervisor). These raters advise the promotion board about the officer seeking promotion. According to the bulletin, the promotion board would "equalize the top, low, and average scores across different shifts and bureaus." The promotability factor for the 1983 lists was apparently derived in accordance with these procedures for all Aurora police officers seeking promotion, including the plaintiffs.

The Rules and Regulations of the Aurora Civil Service Commission provide:

> All advancement shall be determined by competitive examination and shall be open to employees qualified for promotion to a particular position. Promotions shall be made from promotional lists in the manner prescribed by state statutes, *such lists to be compiled on the basis of fair examination, work performance, and oral examination.*

Aurora Civil Service Commission Rules and Regulations, ch. 6, § 6.01, subpart B (emphasis added). Plaintiffs alleged that this provision gave them property and liberty interests under the due process clause of the fourteenth amendment, interests that the Commission infringed by failing to use oral examinations and immediate supervisors' evaluations of performance. They also asserted that their due process rights were violated when the Commission failed to hear their appeal concerning the computation of the promotability rating. (The complaint raised some additional issues, which have not been pursued on appeal.)

The argument that the Commission violated the due process clause by dispensing with the oral examination (and not holding a hearing on a protest) can be characterized in two ways. One is that the Commission's 1982 bulletin changed the rules of the game, and that the plaintiffs were not given an adequate opportunity to protest and have a hearing about the new rules. This line of argument fails because legislative rules can be laid down without the use of any particular process. *Atkins v. Parker*, 53 U.S.L.W. 4655 (U.S. June 4, 1985). The plaintiffs had no entitlement to rules that would remain the same from one examination to the other, and they had no right to individual (or collective) hearings on what the rules would be. A legislative or executive body may formulate rules of general applicability using procedures satisfactory to itself.

The other way to characterize the claim is that the regulation requiring an oral examination was and still is the governing rule, which the Commission flouted in drawing up the list for promotions in 1983. But the plaintiffs have no liberty or property interest in the procedures a state uses, and a violation of procedures is not itself a violation of the Constitution. *Olim v. Wakinekona*, 461 U.S. 238 (1983). The due process clause sets up a two-step inquiry. First the court must ascertain whether there is a liberty or property interest—that is, a legitimate claim of entitlement—in the benefit the plaintiffs seek. If there

is such an interest, the question "what process is due" is one of federal law only. *Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487 (1985). The fact that particular people may have received less process than the state usually provides is of no moment, if they received the federal minimum.

This brings us to the central issue: did the plaintiffs' application for promotion implicate any liberty or property interest, and if so did the absence of oral examinations and evaluations by immediate supervisors deprive them of that interest without due process? The plaintiffs rely principally on *DiIulio v. Board of Fire and Police Commissioners*, 682 F.2d 666 (7th Cir.), *cert. denied*, 459 U.S. 1038 (1982). Unfortunately for plaintiffs, however, we overruled *DiIulio* today. See *Bigby v. City of Chicago*, No. 84-2284 (7th Cir. July 1, 1985). *Bigby* holds that police officers have neither liberty nor property interests in seeking promotion unless the governing regulations and statutes make promotion turn on issues of determinable fact. Here it is tolerably clear that plaintiffs can prove no fact or set of facts that entitles them to promotion. The process of assessment is subjective—indeed, it is to one of the subjective elements that plaintiffs object. The claim of constitutional violation therefore fails.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 6703

ROGER L. BARA, DAVID E. CAMIC, VICTOR GODINEZ, DANNY HORNBACK, FRANK MEXIN, BILL POWELL, ANTHONY C. RUSSO, JOHN P. RYAN, GERALD L. SOOS, JOSEPH L. STRATMAN, and DAVE TORRES,

Plaintiffs,

vs.

AURORA CIVIL SERVICE COMMISSION OF THE CITY OF AURORA, ILLINOIS and DAVID E. CHRISTENSEN, Chief Examiner of the Aurora Civil Service Commission,

Defendants.

MEMORANDUM AND ORDER

This case presents the question whether a group of policeman have either a liberty or property interest of a constitutional dimension in certain procedures used to establish a ranking of policemen for promotion within the Aurora, Illinois, Police Department. We conclude that they do not.

I.

Plaintiffs are members of the Aurora police force. Each of them has been placed upon the 1983 certified promotion

eligibility list for the rank of either sergeant or lieutenant. The Department uses promotion eligibility lists for its promotions and develops new lists every two years. Each person on a list is given a score. The Department makes its promotions based on these scores. Each policeman's score is based on three differently weighted factors: a written examination (50%), seniority (20%), and a "promotability factor" (30%).

It is the derivation of the promotability factor which is at issue here. From the complaint it appears that prior to the 1983 eligibility list this factor was based on the results of an oral examination and an evaluation of a policeman's work performance by an immediate supervisor. In an April 9, 1982, "general bulletin" the defendant Civil Service Commission, through its director, defendant Christensen, announced that a promotion board comprised of the police chief and bureau commanders would assign a promotability score to each policeman seeking advancement. The focus of the promotion board's inquiry was to be the ability of a person to fill a position of higher rank, rather than the individual's past performance. Every policeman in the Department was to be assigned to a "rater." These raters were to be called before the Promotion Board to advise the Board of the status of the policemen seeking promotion. According to the bulletin the use of the Promotion Board would "equalize the top, low, and average scores across different shifts and bureaus." The promotability factor for the 1983 lists was apparently derived in accordance with these procedures for all Aurora policemen seeking promotion, including the plaintiffs.

The Rules and Regulations of the Aurora Civil Service Commission read in part that:

> All advancements shall be determined by competitive examination and shall be open to employees qualified for "promotion to a particular position. Promotions shall be made from promotional lists in the manner prescribed by state statutes, *such lists to be compiled on the basis of fair examination, work performance, and oral examination.*

Aurora Civil Service Commission, Rules and Regulations, ch. 6, §6.01, subpart B (emphasis added). Plaintiffs claim that this provision gives them both property and liberty interests under the due process clause of the Fourteenth Amendment, interests that were infringed upon by defendants' failure to use oral examinations and evaluations of work performance by immediate supervisors when determining the plaintiffs' promotability factor. Plaintiffs also claim that the new method of computing the promotability factor denied them equal protection vis-a-vis police promotional applicants of prior years. They make two additional claims which we do not consider at this time.[1] Plaintiffs brought this action under 42 U.S.C. §1983 and seek a declaratory judgment that the current promotional lists used by the Aurora Police Department have been unconstitutionally derived, an injunction prohibiting defendants from making promotions from the lists, and actual and punitive damages. Defendants have moved for dismissal.

II.

The Fourteenth Amendment prohibits the state from depriving an individual of life, liberty or property without due process of law. Courts have employed a two-step analysis when assessing due process claims. First, plaintiffs must identify a life, liberty or property interest which has been affected by state action. After plaintiffs have established the existence of such an interest the court then considers what procedures are required before the state can deprive the plaintiffs of the interest and whether the defendants have failed to employ the necessary procedures before doing so. *Shango v. Jurich*, 681 F.2d 1091 (7th Cir. 1982).

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[1] Plaintiffs also claim that their due process rights were violated when the Civil Service Commission failed to hear their appeal concerning the use of the Promotion Board. In addition, the complaint alleges that the Police Department conducted a surveillance of a meeting between plaintiffs and legal counsel, in violation of plaintiffs' First Amendment rights.

The boundaries of constitutionally recognized property interests are neither fixed nor clear. The Supreme Court has stated that:

> [P]roperty interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather "property" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a "property interest" for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit. . . .

Perry v. Sindermann, 408 U.S. 593, 601 (1972) (quoting from *Board of Regents v. Roth*, 408 U.S. 564 (1972)). It is well established that "a property interest can be created through a statutory entitlement, the operation of institutional common law, or through the principles of contract law." *Vail v. Board of Education of Paris Union School Dist.*, 706 F.2d 1435, 1437 (7th Cir. 1983). Courts must look behind labels and decide whether a claimed interest is property in the functional sense. *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983). For example, well-established patterns or mutual understandings in the nature of an implied contract may be the basis of a property interest. *Leis v. Flynt*, 439 U.S. 438, 442 (1979). The existence of a property interest is determined primarily by reference to state law. *Bishop v. Wood*, 426 U.S. 341, 344 (1976).

The analysis of the existence of a liberty interest parallels but is not exactly the same as that for property interests. *Jago v. Van Curen*, 454 U.S. 14, 17-23 (1981) (per curiam). The plaintiff must show that a claimed liberty interest is rooted in state law, a well-established understanding between the parties, or a course of conduct which creates substantial limits on the discretion of state officials. It is clear that no person can be arbitrarily deprived by the government of liberty to engage in an occupation. *DiIulio v. Board of Fire and Police Commissioners of City of Northlake*, 682 F.2d 666, 669 (7th Cir. 1982).

III.

It is important to understand exactly what is the basis of the liberty and property interests claimed by the plaintiffs. They do not allege that the new method of computing the promotability factor was part of an effort by defendants to rig the promotion system. *Compare Hermes v. Heim*, 511 F.Supp. 123 (N.D. Ill. 1980) (*see also* earlier opinion at 479 F.Supp. 820 (N.D. Ill. 1979)). Their complaint is not that use of a promotability factor was arbitrary and wholly unrelated to a legitimate promotional scheme. *Compare DiIulio v. Board of Fire and Police Commissioners of the City of Northlake*, 682 F.2d 666 (7th Cir. 1982). They do not allege that they were impermissibly discharged, disciplined or disadvantaged in any employment-related sense as a result of defendants' actions. *Compare Confederation of Police v. City of Chicago*, 547 F.2d 375 (7th Cir. 1977). *Begg v. Moffitt*, 555 F.Sup. 1344 (N.D. Ill. 1983). *See also Board of Regents v. Roth*, 408 U.S. 564 (1972); *Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 673 (1976). Nor is their compliant that they were denied a promotion or some other benefit as a result of the defendants' failure to follow the new method of calculating the promotability factor, once that method had been adopted. *Compare Gaballah v. Johnson*, 629 F.2d 1191 (7th Cir. 1980). Indeed, it appears unlikely that any of the plaintiffs would have been promoted had defendants used the old method of computing the promotability factor.[2] Rather, plaintiffs' complaint is simply

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[2] One plaintiff was ranked 10th on the 1983 promotional elibility list for the lieutenants' rank. The remaining plaintiffs were ranked 21st, 28th, 33rd, 34th, 41st, 47th, 57th, 63rd, 66th, 70th, 80th, 82nd and 87th on the sergeants' list. According to the affidavit of defendant Christensen, six promotions were made from the 1977 sergeants' list and three promotions were made from the 1977 lieutenants' list. Three promotions were made from the 1979 sergeants' list and none from the 1979 lieutenants' list. Christensen also calculated that if the ratings given by the plaintiffs' immediate supervisors had been used instead of the promotability scores, the highest ranking plaintiff on the sergeants' 1983 list would be 17th,

(Footnote continued on following page)

that defendants substituted a promotion board and a system of raters for oral examinations and evaluations by immediate supervisors.

An argument that defendants' prior use of oral examinations and evaluations by immediate supervisors necessarily gave plaintiffs liberty and property interests is indefensible. *Shango v. Jurich*, 681 F.2d 1091, 1100 (7th Cir. 1982); *Suckle v. Madison General Hospital*, 499 F.2d 1364, 1366 (7th Cir. 1974). Such an approach reverses the two-step due process analysis by permitting the plaintiff to imply constitutionally-protected liberty and property interests from the mere existence of procedural safeguards. If property or liberty interests were implied whenever a governmental entity had established certain procedures, these procedures could never be changed without running afoul of due process considerations. The absurdity of such an approach is suggested here, where plaintiffs have not alleged that the new system for calculating the promotability factor was unfair, inaccurate or provided fewer procedural protections to policemen seeking promotion.

The Rules and Regulations of the Aurora Civil Service Commission, the relevant portion of which was quoted above, does provide that a consideration of work performance and an oral examination will be used in the compilation of promotional lists. While hardly irrelevant, this language is not enough in the circumstances to support a claim that plaintiffs had protectable liberty or property interests. The state statute, Ill. Rev. Stat., ch. 24, ¶10-2.1-1 *et seq.*, upon which the civil service provision is based, provides no support for the existence of the liberty and

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[2] *continued*
while the plaintiff on the lieutenants' list would move up to 7th place. Of course, these rankings do not reflect the possible influence of oral examinations. Moreover, plaintiffs' failure to establish that they would have been promoted if the old method of calculating the promotability factor had been used is not determinative. *See* DiIulio v. Board of Fire & Police Commissioners of the City of Northlake, 682 F.2d 666, 670, n. 10 (7th Cir. 1982).

property rights which plaintiffs claim.[3] Plaintiffs have not cited the court to any Illinois case law which supports their position and we have found none. They have not alleged the existence of any mutual understanding between themselves and another party which might give them liberty and property interests so strong as to be infringed upon by the change in the method of calculating

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[3] The most relevant statutory provision reads as follows:

> *Promotions-Merit-Seniority*—The board, by its rules, shall provide for promotion in the fire and police departments on the basis of ascertained merit and seniority in service and examination, and shall provide in all cases, where it is practicable, that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to examination. All promotions shall be made from the 3 having the highest rating, and where there are less than 3 names on the promotional eligible register, as originally posted, or remaining thereon after appointments have been made therefrom, appointments to fill existing vacancies shall be made from those names or name remaining on the promotional register. The method of examination and the rules governing examinations for promotion shall be the same as provided for applicants for original appointment, except that original appointments only shall be on probation, as provided by the rules. The board shall strike off the names of candidates for promotional appointment after they have remained thereon for more than 3 years, provided there is no vacancy existing which can be filled from the promotional register.

Ill. Rev. St., ch. 24, ¶10-2.1-14.

The Illinois courts which have interpreted this provision have hesitated to imply vested rights in favor of policemen plaintiffs. *See* Brunke v. Board of Fire and Police Commissioners of the City of Countryside, 99 Ill. App. 3d 25, 54 Ill. Dec. 503, 505-506, 425 N.E.2d 15, 17-18 (1st Dist. 1981); McCoy v. Board of Fire and Police Commissioners of the Village of Hanover Park, 79 Ill. App. 3d 742, 35 Ill. Dec. 70, 72, 398 N.E.2d 1020, 1021 (1st Dist. 1979). They have also recognized that local officials have a substantial discretion in setting up and operating promotions systems. *See* Zuelke v. Board of Fire & Police Commissioners of Broadview, 79 Ill. App. 3d 1080, 35 Ill. Dec. 130, 132, 398 N.E.2d 1080, 1082 (1st Dist. 1979).

the promotability factor. Similarly, they do not allege that they had developed a reliance interest in the old procedures sufficient to create liberty and property interests in their favor. In essence, plaintiffs' claims are no more than an expression of "an abstract need or desire" for the continued use of oral examinations and evaluations by immediate supervisors; interests which are but "unilateral expectation[s]" and not entitled to constitutional protection. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

IV.

Plaintiffs' equal protection claim does not survive scrutiny. They do not allege that they were burdened in the exercise of a fundamental right. Plaintiffs were not treated any differently than any other policeman who was placed on the 1983 promotion eligibility lists. Because policemen are promoted only from the most current list, plaintiffs are not being treated differently in any constitutionally significant way than prior promotional applicants.

Conclusion

Plaintiffs' claim that defendants violated their due process and equal protection guarantees by failing to employ oral examinations and work evaluations by immediate supervisors when preparing the 1983 promotion eligibility list is dismissed. This court does not reach plaintiffs' other claims since they were not sufficiently addressed in the briefs.

/s/ James B. Moran
Judge, United States District Court

Nov. 15, 1982.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable JAMES B. MORAN

Cause No. 83 C 6703 Date Nov 15, 1983

Title of Cause: ROGER L. BARA ET AL. VS AURORA CIVIL SERVICE ETC. ET AL.

* * * * *

ORDER

Enter Memorandum and Order. (DRAFT) Plaintiffs' claim that defendants violated the due process and equal protection guarantees by failing to employ oral examinations and work evaluations by immediate supervisors when preparing the 1983 promotion eligibility list is dismissed. This court does not reach plaintiffs' other claims since they were not sufficiently addressed in the briefs. (See DRAFT for particulars) Status hearing set for November 30, 1983 at 9:45 a.m.

/s/ Moran, J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 6703

ROGER L. BARA, DAVID E. CAMIC, VICTOR GODINEZ, DANNY HORNBACK, CARL J. IVANYI, STAN KAHLE, SANTOS FRANCISCA GARZA KOEHNKE, FRANK MEXIN, BILL POWELL, ANTHONY C. RUSSO, JOHN P. RYAN, GERALD L. SOOS, JOSEPH L. STRATMAN, and DAVE TORRES,

Plaintiffs,

vs.

AURORA CIVIL SERVICE COMMISSION OF THE CITY OF AURORA, ILLINOIS and DAVID E. CHRISTENSEN, CHIEF EXAMINER OF THE AURORA CIVIL SERVICE COMMISSION,

Defendants.

MEMORANDUM AND ORDER

This is the latest, and last, installment of a dispute between the parties over the procedures used by the defendants in mid-1983 to promote police officers. In a November 15, 1983 memorandum and order this court held that plaintiffs did not have a viable constitutional challenge to the procedures, but left open other claims because they had not been sufficiently addressed in the briefs. Subsequently, plaintiffs elected to advance the claim that on two occasions they were unconstitutionally denied an opportunity to challenge the promotional system in a hearing before the Aurora Civil Service Commission. Defendants have moved for summary judgment.

The promotional exam was given on July 6, 1983. On August 8, 1983 one of the plaintiffs filed a notice of pro-

test. In an August 10, 1983 letter the Aurora Civil Service Commission responded to his protest and announced its decision to let stand the promotional rankings established in reliance upon the test. While plaintiffs assert that they subsequently filed another protest, the protest—attached to the complaint but not to the motion—is unsigned and it has not been established—although not denied—that it was ever received by defendants. The complaint suggests that not all of the plaintiffs joined in this second protest. In any event, assuming that all of the plaintiffs did join in the protest or protests, they have not made out a procedural due process claim.

Rule 6.11 of the Aurora Civil Service Commission provides in part:

> *PROTEST OF EXAMINATION BY APPLICANTS.* An applicant wishing to protest an examination must within three (3) days (excluding weekends and holidays) after such test file a written *Notice of Protest* with the Commission.
>
> A. No protest will be heard that is not filed within three days of the date of the examination. . . .

Plaintiffs do not deny that they knew of the deadline for filing protests; they do not challenge defendants' right to follow procedures designed to resolve personnel disputes promptly; and, they do not dispute that the protests were filed late. Consequently, the Commission's consideration of the first protest was wholly gratuitous and its failure to respond to renewed protest was not improper. Having failed to follow proper procedures plaintiffs have not shown that they were wronged in a constitutional sense.

Conclusion

Defendants' motion for summary judgment on the issue of the Civil Service Commission's treatment of plaintiffs' protests is granted and the complaint is dismissed.

/s/ James B. Moran
Judge, United States
District Court

December 10, 1984.

JUDGMENT IN A CIVIL CASE

United States District Court	NORTHERN DIST OF ILL., EASTERN DIV.
ROGER L. BARA ET AL.	No. 83 C 6703
v.	
AURORA CIVIL SERVICE COMMISSION ETC.	Judge JAMES B. MORAN

X *Decision by Court.* This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Defendants' motion for summary judgment on the issue of the Civil Service Commission's treatment of plaintiffs' protests is granted and the complaint is dismissed. (See Memorandum and Order dated 12-10-84)

H. Stuart Cunningham
Clerk

/s/ Willie A. Haynes
Deputy Clerk

Date 10 Dec 84

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2284

WILLIAM C. BIGBY, et al.,

Plaintiffs,

and

MAURICE THOELE, et al.,

Intervening Plaintiffs-Appellants,

v.

CITY OF CHICAGO and
CHICAGO POLICE DEPARTMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 80 C 5246—**Prentice H. Marshall**, *Judge.*

ARGUED APRIL 18, 1985—DECIDED JULY 1, 1985

Before CUDAHY and POSNER, *Circuit Judges*, and PELL, *Senior Circuit Judge.**

* Pursuant to Circuit Rule 16(e) (rehearing en banc, *sua sponte*, before decision), this opinion was circulated, before publication, to all the judges of the court in regular active service, because it overrules *DiIulio v. Board of Fire & Police Comm'rs*, 682 F.2d 666 (7th Cir. 1982). No judge voted to hear the case en banc.

POSNER, *Circuit Judge.* A group of black police sergeants brought suit against the City of Chicago under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, alleging that the City had discriminated against them by refusing to promote them to lieutenant, because they had failed a lieutenants' examination which they contended was racially biased. A group of white and Hispanic police sergeants was allowed to intervene in the suit, to challenge the exam on a different ground: that it simply was not related to what a lieutenant does, and therefore violated the intervenors' rights under the due process clause of the Fourteenth Amendment. The district judge, after a bench trial, held in favor of the plaintiffs (the black sergeants) but against the intervenors. The judge's entire discussion of the intervenors' claim is as follows: "Although we have found defendants' 1977 lieutenants examination invalid under Title VII, it does not follow that it was arbitrary and capricious so as to entitle the intervenors, Maurice Thoele, et al. to recover under the Due Process Clause of the fourteenth amendment. While they may be the beneficiaries of the Bigby plaintiffs' victory, they are not entitled to any relief in their own right." They appeal.

It might seem that as "beneficiaries" of the plaintiffs' victory (from which, incidentally, the defendants have not appealed), the intervenors would have no standing to complain that the district court had failed to award them "relief in their own right"; it might seek that by knocking out the exam the plaintiffs had gotten everything the intervenors wanted. But the district judge ordered the immediate promotion of 11 black sergeants to lieutenant. If he had found that the intervenors' constitutional rights had been infringed as well as the plaintiffs', he surely would have ordered some of the intervenors promoted immediately, instead or in addition. Their claim is not moot.

The district judge rejected the claim on the ground that the lieutenants' examination was not arbitrary or capricious. But the basis of this conclusion is unexplained. The opinion contains many devastating criticisms of the lieu-

tenants' examination en route to the conclusion, apropos the black sergeants' claim, that the exam is not "job related" within the meaning of cases interpreting Title VII. It is true that an exam might fail to survive the exacting scrutiny to which Title VII subjects examinations that have a disproportionate impact on a protected group such as blacks yet still not be so unreasonable as to create constitutional doubts unrelated to discrimination. Indeed, it would be quite odd if Title VII provided the measure of what is due process of law in public employment. This must have been what the judge thought. But what is unclear from the district judge's opinion—which has not a good word to say about the exam—or from the record before us on this appeal is *why* he thought the exam, though not job-related, was yet not arbitrary, capricious, or in a word irrational. If it were obvious why, we could uphold the district judge's decision despite his failure to explain. But it is not obvious. So if we thought that there was a constitutional right, unrelated to racial or other discrimination, to a rational test for promotion to a higher rung in the civil service of a state or municipality, we would remand the case for the judge to explain why he thought the lieutenants' test unreasonable, though not job-related in a Title VII sense. But we do not think there is such a right. We first show how we reached this conclusion as a matter of principle, and then show that the case law supports our conclusion notwithstanding the contrary precedent of *DiIulio v. Board of Fire & Police Comm'rs*, 682 F.2d 666 (7th Cir. 1982).

The due process clause of the Fourteenth Amendment forbids a state to deprive anyone of life, liberty, or property without due process of law. To make out a case under the clause one must therefore show first that one was deprived of life, liberty, or property, and second that the deprivation was brought about without due process of law. Neither element is present here.

The Supreme Court has held that the job of a tenured civil servant is property. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1491-92 (1985). So if a City

of Chicago policeman, who under the law of Illinois cannot be fired without cause, see Ill. Rev. Stat. 1981, ch. 24, ¶ 10-1-81.1, is fired, this is a deprivation of property; and he has only to show that it was done without due process of law in order to prove a violation of the Fourteenth Amendment. But these sergeants did not have a property interest in the rank, which they had not yet attained, of lieutenant. It is true that state law requires promotions of government employees, including policemen, to be "on the basis of ascertained merit and seniority in service and examination." Ill. Rev. Stat. 1981, ch. 24, ¶ 10-1-13; see Chicago Municipal Code ¶¶ 25.1-3, 25.1-5 (1977). (The statutory provisions for police forces in smaller municipalities are slightly different. See Ill. Rev. Stat. 1981, ch. 24, §§ 10-2.1-6, 10-2.1-15. So far as the issues in this case are concerned, the current Chicago Municipal Code (1982) is identical to the 1977 Code in effect when these sergeants were denied promotion.) The statute and ordinance create an expectation that the examinations used for promotions in the civil service will be fair but, as the Illinois courts have held, not so firm and definite an expectation as to be "property" in a constitutional sense. See, e.g., *Sullivan v. Board of Fire & Police Comm'rs*, 103 Ill. App. 3d 167, 172, 430 N.E.2d 636, 640 (1981) (construing the provisions relating to smaller municipalities—provisions actually more protective of promotion rights than the provisions applicable to Chicago); cf. *Confederation of Police v. City of Chicago*, 547 F.2d 375, 376 (7th Cir. 1977). For it is not the examination that the applicant is interested in—no one likes taking tests—but the job. And with few lieutenants available no one can have much confidence of doing well enough on the exam to become a lieutenant, especially since the grade on the examination is only one factor that the promoting authorities take into account in deciding whether to promote; the others are seniority and any evidence of merit besides the examination grade, such as the officer's efficiency rating by his superiors. See, e.g., Chicago Municipal Code, § 25.1-5(6)(b) (1977); *Lenert v. Wilson*, 56 Ill. App. 2d 325, 206 N.E.2d 294, 297 (1965). One has no "right" to a good efficiency rating from one's superior; rating is an exer-

cise of the superior's discretion. See *Lenert v. Wilson, supra,* 56 Ill. App. 2d at 332-34, 206 N.E.2d at 298, cf. *Zuelke v. Board of Fire & Police Comm'rs,* 79 Ili. App. 3d 1080, 1082, 398 N.E.2d 1080, 1082 (1979). Yet without such a rating one is most unlikely to be promoted to lieutenant.

Furthermore, the promoting officials are authorized to choose among the highest-rated applicants, and no criteria are provided for the choice. See Ill. Rev. Stat. 1981, ch. 24, ¶ 10-1-13; Chicago Municipal Code ¶ 25.1-5(5) (1977). Construing the counterpart provision in the statute governing the police forces of smaller municipalities, *McCoy v. Board of Fire & Police Comm'rs,* 79 Ill. App. 3d 742, 744, 398 N.E.2d 1020, 1022 (1979), holds that "the promotion of a patrolman to sergeant is one of discretion," so that the plaintiff "had no vested right to promotion." The same is true of promotion from sergeant to lieutenant. Indeed it is more strongly true, since discretionary factors loom larger as one moves up in a hierarchy. Promotion to lieutenant's rank is not a matter of right and is not governed by fixed rules which if complied with automatically entitle the applicant to promotion. "To have a property interest . . . a person . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate *claim of entitlement* to it." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972) (emphasis added). That is missing here.

Nor do we think the intervenors were deprived of their liberty. There is indeed a concept of liberty of occupation; it goes back to the eighteenth century, see, e.g., Madison, *Essay on Property,* in 6 Madison, Writings 101 (Hunt ed. 1906 [1792]), and is the animating concept behind a number of old decisions in which the Supreme Court struck down state laws that interfered with that liberty. See, e.g., *Smith v. Texas,* 233 U.S. 630, 637-38 (1914); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). Although the Court has since abandoned the idea that the due process clause is a general charter of economic freedom, it has continued to provide limited protection for liberty of occupation. See, e.g., *Hampton v Mow Sun*

Wong, 426 U.S. 88, 102 (1976). Important examples are cases decided in the 1950s and early 1960s concerning the reasonableness of conditions on admission to the bar. See, e.g., *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). And cases such as *Codd v. Velger*, 429 US. 624 (1977) (per curiam), which hold that firing a public worker under conditions that "stigmatize" him may invade his liberty even if he has no property right in his job, seem to rest on the idea that stigmatization may prevent him from getting another position in the same line of work. See *Lawson v. Sheriff of Tippecanoe County*, 725 F.2d 1136, 1138-39 (7th Cir. 1984); *Bone v. City of Lafayette*, No. 82-1976, slip op. at 6-8 (7th Cir. May 29, 1985); *Smith v. Board of Educ.*, 708 F.2d 258, 265 (7th Cir. 1983).

But the examination challenged in this case, while it may prevent some sergeants from becoming lieutenants in the Chicago police force, does not exclude anyone from an occupation. To be a policeman is to follow a particular calling, and to be excluded from that calling is an infringement of liberty of occupation. But a particular rank in the police force is not an occupation, just as the army is not a series of separate occupations, ranging from buck private to general of the armies, and just as the private practice of law is not composed of two occupations—partner and associate. Of course a profession may have distinct occupations; the medical profession has nurses as well as doctors. Cf. *Smith v. Texas*, *supra*, 233 U.S. at 639. But ranks within an occupation—head nurse versus rank-and-file nurse, for example—are not "occupations" themselves; and while preventing someone from advancing in his occupation can be a cruel deprivation, it would stretch the idea of liberty of occupation awfully far, it seems to us, to treat a bar to promotion as a deprivation of that liberty. Cf. *Munson v. Friske*, 754 F.2d 683, 693 (7th Cir. 1985).

But even if being denied a promotion because one had flunked an unfair examination could be a deprivation of liberty within the meaning of the due process clause of the Fourteenth Amendment, the intervenors would lose; there was no denial of due process. The usual though not

exclusive modern meaning of the term is notice of charges and an opportunity for a hearing appropriate to the nature and gravity of those charges. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976). There was no denial of due process in that sense. It is not as if the city had told the sergeants that they could not take the exam, and refused to give them a chance to be heard on why they were being barred. The sergeants are not complaining about lack of notice or lack of an opportunity for a hearing or lack of any other procedural safeguards. They complain that the poor design of the examination violates due process. This has nothing to do with administrative, judicial, arbitral, or any other procedure; it has to do with the substantive criteria for promotion.

This observation does not end the case, however. Oxymoron though it is, "substantive due process" continues to be a recognized concept of constitutional law. The best known modern instance is the right to an abortion, see *Roe v. Wade*, 410 U.S. 113 (1973), a right that rests on the due process clause of the Fourteenth Amendment but that has nothing to do with notice and hearing; but there are other examples within the general area of the family and sex. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). The appellants in this case have alleged the denial of another form of substantive due process. They claim a constitutional right to be tested for promotion by examinations reasonably related to the actual needs of the position for which they have applied.

We do not believe, however, that this is a valid federal constitutional claim, even if there is (as we doubt) a sense in which the appellants may be said to have been deprived of liberty by being subjected to an unfair test that they flunked. They may have a claim under state law. Cf. *Burns v. Sheriff's Dept. Merit Comm'n*, 86 Ill. App. 3d 226, 407 N.E.2d 1134 (1980); *Beard v. Board of Police Comm'rs*, 130 Ill. App. 3d 692, 474 N.E.2d 918 (1985). Nothing said in this opinion is intended to prejudge that claim. In fact they appended such a claim as a pendent to their federal constitutional claim, and we interpret the district judge's silence about their state claim as a deci-

sion to relinquish pendent jurisdiction over it, a decision that seems reasonable in the circumstances but that in any event the intervenors do not challenge in this court.

Whatever the original meaning of "due process of law," and whatever the intentions of those who drafted and ratified section 1 of the Fourteenth Amendment, the concept has been used to invalidate state action unrelated to judicial or administrative procedure or to specific rights enumerated in the Bill of Rights only when that action was deeply repulsive to the feelings of the Supreme Court Justices. In an earlier day it was action restricting economic liberty beyond the narrow bounds thought proper by the classical economists and the ideologists of laissez-faire; more recently it has been action restricting freedom of choice in intimate personal relations. A civil service examination unfair in the sense not of oppressing some racial or ethnic group for whose members the examination may be culturally inaccessible, or even just of flunking more members of one such group than of another, but of being a stupidly designed test hopelessly maladapted to the purposes for which it is being given, does not shock the conscience. To hold that it does would result in making the federal courts a super Civil Service Commission, reviewing examinations for promotions in every civil service in the United States. The federal courts do not need this additional burden. Cf. *Bishop v. Wood*, 426 U.S. 341, 349 and n. 14 (1976).

All this is not to say that the Constitution gives black police sergeants more rights than white ones, by enabling only blacks to complain in federal court about the reasonableness of the examination for police lieutenants. The law gives more rights to victims of discrimination than to nonvictims; but the victims can be white as well as black. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976); *Rucker v. Higher Education Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982). The intervenors do not complain of racial discrimination. A federal forum may be necessary to assure the vindication of constitutional rights against racial discrimination, but for remedies against a bad exam a state forum ought to be sufficient. There is,

indeed, a conflict between the constitutional rights asserted by the plaintiffs and by the intervenors, since, as suggested in our discussion of mootness, if the intervenors won their case this might reduce the amount of relief available to the plaintiffs.

What must give us pause, though, is our decision in *DiIulio v. Board of Fire & Police Comm'rs*, 682 F.2d 666 (7th Cir. 1982), which held that white policemen in Illinois who were not alleging racial discrimination had stated a claim under the due process clause of the Fourteenth Amendment just by showing that the test for police sergeant which they had flunked did not bear a "direct and substantial" relationship to a sergeant's job. *Id.* at 669. We based this conclusion on the Supreme Court's decisions dealing with liberty of occupation, but we did not distinguish between exclusion from an entire occupation and exclusion from a particular position or rank in the occupation, nor between fair procedure and other ideas of due process.

DiIulio stands alone except for a single decision by a district court in this circuit which naturally considered itself bound by *DiIulio*. See *Ka Nam Kuan v. City of Chicago*, 563 F. Supp. 255, 257 (N.D. Ill. 1983). Occasional references in other cases to the possibility of a property interest in promotion merely assume there might be such an animal, en route to holding that the plaintiff had failed to prove a violation of the Constitution. See *Hermes v. Hein*, 742 F.2d 350, 355 (7th Cir. 1984); *Lavash v. Kountze*, 604 F.2d 103, 105-06 (1st Cir. 1979) (per curiam); *Bara v. Aurora Civil Service Comm'n*, 580 F. Supp. 212, 214-16 (N.D. Ill. 1983). Many cases are contrary to *DiIulio*. See, e.g., *Robb v. City of Philadelphia*, 733 F.2d 286, 293-94 (3d Cir. 1984) (a case factually almost identical to *DiIulio* and to the present case); *Clark v. Whiting*, 607 F.2d 634, 638, 641 (4th Cir. 1979); *Burns v. Sullivan*, 619 F.2d 99, 104-05 (1st Cir. 1980); *Doyle v. University of Alabama*, 680 F.2d 1323, 1326 (11th Cir. 1982); *Beitzell v. Jeffrey*, 643 F.2d 870, 875-79 (1st Cir. 1981); *Meyr v. Board of Educ.*, 572 F.2d 1229, 1232 (8th Cir. 1978); cf. *Levitt v. University of Texas*, No. 84-1700, slip op. at 4271-72 (5th

Cir. May 10, 1985); *Sandlin v. Johnson*, 643 F.2d 1027 (4th Cir. 1981). The most significant of the cases is *Webster v. Raymond*, 599 F.2d 793 (7th Cir. 1979), for it was a previous decision of this circuit, squarely contrary to, yet not cited in, *DiIulio*. *Webster* unanimously rejected a claim that denial of promotion to a higher rank in the civil service (in that case, promotion from teacher to principal) is a deprivation of liberty or property within the meaning of the due process clause. See 599 F.2d at 796-802. *Begg v. Moffitt*, 555 F. Supp. 1344, 1347 n. 7 (N.D. Ill. 1983), tries to reconcile the two cases on the ground that *Webster* was about "procedural" due process and *DiIulio* about "substantive" due process; but *Webster* is about substantive due process, too—the court in *Webster* said so, see 599 F.2d at 801-02. In *Altman v. Hurst*, 734 F.2d 1240, 1243 (7th Cir. 1984) (per curiam) (dictum), we cited *Webster* for the proposition "that no liberty interest is implicated where a plaintiff is denied a promotion, since he remains free to seek alternate employment if dissatisfied with his job."

Under the rules of this circuit a panel decision cannot be overruled without circulation of the overruling decision, before publication, to all the judges of the court who are in active service. See 7th Cir. Rule 16(e). That was not done in *DiIulio*; evidently the panel that decided *DiIulio* was unaware of *Webster*. This is not surprising; the briefs in *DiIulio* do not cite *Webster*, and *DiIulio* was decided without oral argument (a circumstance in which some will find an implicit message concerning the value of oral argument). Naturally the authority of *DiIulio* is less than it would be if it had considered and rejected *Webster*. We are forced to choose between *Webster* and *DiIulio*. We choose *Webster*. It accords with the great weight of authority and the recent understanding of this circuit reflected in *Altman v. Hurst*, and expresses the better view as an original matter.

The judgment of the district court dismissing the claim of the intervenors is

AFFIRMED.